

**In the United States
Circuit Court of Appeals
For the Ninth Circuit**

MATTHEW EDWARD DEADY, HANOVER DEADY,
and THE FIRST NATIONAL BANK OF PORT-
LAND, a national banking association,

vs. Appellants,

RICHARD HOWELL, Appellee.

RICHARD HOWELL, Cross-Appellant.
vs.

MATTHEW EDWARD DEADY, HANOVER DEADY,
and THE FIRST NATIONAL BANK OF PORT-
LAND, a national banking association,
Cross-Appellees.

Cross-Appellant's Reply Brief

Upon Appeals from the District Court of the United States
for the District of Oregon.

HON. JAMES ALGER FEE, District Judge

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**Plaintiff Is Entitled to Two-thirds of the Present Income
From the Property, After Payment of the Charges.**

For the purposes of the cross-appeal, we assume that the trial court's holding was correct as to the meaning of the will, and that under it Henderson took a fee interest in two-thirds of the property, subject to being defeated only if he died without issue

prior to the death of the testatrix. Since he survived the testatrix he took an absolute fee upon her death which passed by successive devises to his widow, Charlotte, and to her son, Richard Howell, the present plaintiff.

In spite of the trial court's holding that the plaintiff was the owner of two-thirds in fee, however, it denied him the right to any of the present income from the property until the death of Marye Thompson Deady. This result supposedly followed from the stipulation of October 28, 1935, (Deft's. Ex. E, Tr. 307) which settled the suit of Marye Thompson Deady whereby she sought to impress a trust upon one-third of the property in her favor.

That stipulation, after reciting the compromise and settlement of Marye's suit, merely provided for certain monthly payments from the income of the property, in lieu of certain payments provided for in Lucy's will. Under the stipulation, Marye Thompson Deady was to receive \$150 per month for life, instead of \$75 as provided in the will; Henderson was to receive \$400 per month, as formerly provided in the stipulation of October,, 1942 (Deft's. Ex. Ex. J., Tr. 281), "or such other sum per month during the administration of the estate of said Lucy A. H. Deady in the discretion of the executors as they may deem proper *and until he shall become entitled to the full distribution provided for in said will*" (italics ours); and all other payments of income were to remain as provided in the will—namely, \$150 per month to Mary E. Deady for life and \$100

each per month to Matthew and Hanover. The only real change was the increase of Marye's share.

The stipulation then authorized the "executors and the trustees and managers of said property and their successor or successors, whether named in the will or otherwise appointed" to make the payment to Marye; directed them to defer the creation of the sinking fund (invalid anyway) until after the death of Mary, Marye or Henderson; and waived all claims against the executors, etc., arising out of the changes made by the stipulation.

It then provided that Marye should make, execute and deliver to Henderson, Matthew and Hanover "*in proportion to their interests*" a special warranty deed to the property, subject to the terms of the stipulation and to the payment to her of the agreed amount. Then—and this is apparently the clause on which the trial court based its decision—the stipulation provided as follows: (Tr. 310)

"And said lot shall be impressed with and be held in trust and remain in the possession of the trustees and the income from said property shall be collected and distributed by the trustees and said property shall be and remain charged with the payment of said \$150. per month to said Marye T. Deady during the remainder of her natural life."

We agree with counsel for defendants when they say that this stipulation did not create a trust—but for a different reason. They assert that it but *recognized a pre-existing trust*, while we contend that a

true trust did not exist at all—either under the will or under the stipulation.

It was pointed out in our former brief (p. 64), and held by the trial court (Tr. 150), that under the will legal title did not at any time pass to the executors or “trustees”, as such, but vested immediately in the beneficial owners— $\frac{2}{3}$ in Henderson and $\frac{1}{6}$ each in Matthew and Hanover. The powers and duties of the executors were merely those pertaining to the administration of the estate—the collection of the income necessary to the payment of specific legacies. As stated by the trial court (Tr. 150), “the power to renew the mortgage is given to the fee owners, and the restriction against alienation is placed directly against them, not against the executors.”

Before there can be a trust, the legal title must be vested in the one alleged to hold as trustee.

“A trust is created only where the title to property is held by one person for the benefit of another.”

Scott on Trusts, p. 36, Sec. 2.6.

It could hardly be contended that this stipulation itself operated as a conveyance of legal title to the alleged “trustees”, especially in view of the provision that Marye is to execute a special warranty deed *to Henderson, Matthew and Hanover* in proportion to their interests—not to the alleged “trustees”.

In our view the situation created—or continued—by this instrument was not a trust, but rather *an equitable charge*, under which the devisees, Matthew, Hanover and Henderson (the latter now replaced by

the plaintiff, Richard Howell) took the legal title in their respective proportions, subject only to a *security interest* in favor of each of the persons named therein, to enforce the monthly payments. The distinction between a charge and a trust has been well pointed out by a leading authority:

“Sec. 10. *Trust and equitable charge.* If a testator devises or bequeaths property subject to the payment of certain sums of money to third persons, he thereby creates an *equitable charge*, not a *trust*. An equitable charge is like a trust in that in each case the legal title to property is vested in one person and an equitable interest in the property is given to another. The interest which the equitable encumbrancer has, however, is different from the interest of a beneficiary of a trust. The equitable encumbrancer has only a security interest in the property; the beneficiary of a trust is, to the extent of his beneficial interest, the equitable owner of the trust property. If a devisee subject to an equitable charge fails to pay the equitable encumbrancer the sum to which he is entitled, the latter’s remedy is a suit in equity to obtain a decree for the sale of the land to pay the charge; if a trustee fails to perform his duties under the trust, the remedy of the beneficiary is a suit in equity to compel specific performance or redress of the breach of trust. The duty of a devisee subject to an equitable charge with respect to the property is a negative one; he must not so deal with the property as to destroy or interfere with the equitable lien of the encumbrancer, as for example by transferring it to a purchaser for value and without notice of the charge.

“If property is transferred in trust for a particular purpose and the purpose is fully accom-

plished without exhausting the trust property, the trustee cannot keep the trust property for his own benefit, but holds it upon a resulting trust for the settlor or his estate, unless by the terms of the trust the settlor manifests an intention that the trustee in such case should keep the property. In the case of an equitable charge, on the other hand, if the amount of the charge is paid, the person who holds subject to the charge can keep the property for his own benefit." (Scott on Trusts, p. 71-2)

"Sec. 10.4. *Character of relation.* An equitable charge, unlike a trust, does not involve a fiduciary relation. A person who takes property subject to an equitable charge is not in a fiduciary relation to the equitable encumbrancer; he simply holds the property subject to the security interest of the other." (Scott on Trusts, p. 76)

"Sec. 10.6. *Intention to create charge or trust.* Whether an equitable charge or a trust is created depends upon the manifestation of intention of the transferor. If the intention is to impose a duty upon the transferee to deal with the property for the benefit of a third person and to give the third person the beneficial interest in the property, a trust is created; if the intention is to give the beneficial interest to the transferee and merely to give a security interest to the third person, an equitable charge is created. If a testator devises land and directs the devisee to sell the land and to pay the proceeds or a part of the proceeds to a third person, a trust is created. On the other hand, if the testator devises land 'subject to the payment of' a certain sum to a third person, or 'he paying' a certain sum to a third person, an equitable charge and not a trust is created. So also if land is devised to a person 'on

condition that he pay' a certain sum to a third person, ordinarily *an equitable charge and not a trust* or condition is created." (Scott on Trusts, p. 77)

The present situation is exactly that described by the above author as constituting a charge, rather than a trust; and indeed the will itself recites "*Subject to the conditions, provisions and charges*", obviously referring to the monthly payments; and the stipulation provides that the property "shall be and remain *charged* with the payment." The stipulation merely modified the charge which the will created.

Viewed in that light—as it must be, we conceive—there can be no question but that the plaintiff is entitled to his proportionate share of the income after the charges are paid. He is the holder of legal title, as well as the principal beneficial interest; and when the charges are fully satisfied, where else could the income go? Surely not to the First National Bank, for its own use, and there is no direction that it be accumulated! The charge is merely a lien for security, and as each of the payments is made, the purpose of the security is fulfilled, freeing the balance of the income to follow the ownership of the property.

As a matter of fact, however, even if the stipulation did create a trust, as the trial court seemed to think, the same result would follow. As stated by Scott in the passage quoted above:

"If property is transferred in trust for a particular purpose and *the purpose is fully accom-*

plished without exhausting the trust property, the trustee cannot keep the trust property for his own benefit, but holds it upon a resulting trust for the settlor or his estate, unless by the terms of the trust the settlor manifests an intention that the trustee in such case should keep the property.” (Scott on Trusts, p. 72)

Even if the bank were now a true trustee, it would have no authority to *retain* the balance of the income after making the monthly payments, but the surplus would revert *to the estate*, and under paragraph nine of the will would “follow the title and ownership of said real property”, two-thirds to Henderson (now replaced by Richard Howell, the plaintiff) and one-third to Matthew and Hanover. From another angle, the trust would fail for want of a beneficiary for the unexpended balance of the income—if there were a trust in the first place.

The mere fact that Richard Howell is not named personally in the stipulation is of no significance, for he succeeded to whatever interest Henderson had in the property. If Henderson had complete ownership, subject only to a security interest to enforce the payments, then Richard Howell takes the same estate. If there was a trust, and Henderson was entitled to a share of the income, which was not required for trust purposes, then Richard Howell has the same interest in the income.

In summary, then, if title to the property passed directly to the devisees, subject only to an equitable charge to secure the monthly payments—as we deem

the true situation to have been—then it is clear that the holder of title is entitled to any surplus remaining after payment of the charge.

On the other hand, if a trust was created for the payment of these amounts, either under the will or under the stipulation, and the purposes of the trust do not absorb the entire income from the property, then the balance reverts to the estate and descends to the beneficial owners in their proportionate shares. In the absence of a specific direction, in the trust instrument, a trustee certainly has no authority to retain and accumulate the income from the trust property.

In either event, the plaintiff, as the owner of $\frac{2}{3}$ in fee, is entitled to that proportion of the income, after payment of the charges; and the trial court's denial of his right to the income was wholly inconsistent with its holding as to the devolution of the fee.

Respectfully submitted,

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